IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN and ELIZABETH DEWEY, Appellants, v. RAUL and GLORIA GONZALES, Respondents.	No. 37449-8-II UNPUBLISHED OPINION

Penoyar, A.C.J. — John Dewey appeals a trial court decision denying an injunction against Raul Gonzales ordering the removal of Gonzales's home, which encroaches on Dewey's property. The trial court found that Gonzales trespassed on Dewey's land and had not demonstrated that he adversely possessed the land. After balancing the equities, however, the trial court determined that an injunction ordering removal was inappropriate. Instead, the trial court ordered Gonzales to pay Dewey $795 for the boundary adjustment, giving Gonzales the 1,500 square feet where his home is sited. Dewey now appeals, arguing that (1) the trial court violated the Washington Constitution by ordering the boundary adjustment; (2) substantial evidence did not support the trial court's equitable denial of the injunction; (3) substantial evidence did not support the trial court's determination of damages; and (4) substantial evidence did not support the trial court's finding that Gonzales surveyed and legally subdivided his land in 1982. Dewey's arguments are unpersuasive, and we affirm.

FACTS

In the late 1970s, Gonzales purchased a twenty acre parcel of undeveloped land in Port Orchard. In the 1980s, Gonzales subdivided the land into four five-acre parcels, A, B, C, and D. Gonzales cleared the land and began developing parcel A in 1982. Over the next twenty years, he developed the lots alphabetically, finishing with parcel D. Gonzales began development of parcel D in 1992 and completed building his house on that parcel in 1999 or 2000. In early 2004, Dewey bought two parcels neighboring Gonzales's property, 1 and 2.[1] Parcel 1 was roughly 5.25 acres and shared a western boundary with Gonzales's parcel D.

Before Dewey purchased the land, Dewey's realtor expressed concerns about the proper location of the western boundary. The realtor hired a "finder" to locate the corner boundary marker establishing the boundary between parcel D and parcel 1. Report of Proceedings (RP) at 249. The finder was unable to find any marker. Additionally, Dewey testified that he "suspected" that Gonzales's house encroached on his land but that he did not consider it a "risk." RP at 250. Despite his concerns, Dewey did not commission a physical survey until 2005, several months after he purchased the land. The survey revealed that Gonzales's house, garage, and yard encroached roughly 1,500 square feet onto Dewey's property.

In May 2005, Dewey sued Gonzales in Kitsap County court for trespass and ejectment. Dewey requested relief in the form of compensatory damages, an order of ejectment, an order quieting title, an injunction from trespass, and an award of attorney fees and costs. In his answer, Gonzales admitted encroaching on Dewey's land and counter claimed that he had acquired the

[1] The trial court referred to the parcels as parcel A and parcel B. For clarity, here we refer to the parcels as 1 and 2.

land through adverse possession.

The trial commenced on August 29, 2007. Dewey and Gonzales presented conflicting testimony as to when and where the boundary lines were flagged. Gonzales testified that when he divided his land into four parcels, he hired Westsound Surveying to plat the land physically and to draw up documents reflecting the property boundaries.[2] Gonzales was unsure of the exact year that Westsound conducted the survey, first testifying that it was done in 1982 or 1983 but later saying that it might have been as late as 1986. Gonzales testified that Westsound placed the orange survey markers that he relied on when developing the land. Gonzales produced several photographs showing orange survey tags placed along what Gonzales assumed was the property boundary. Gonzales also pointed out his house and yard in several pictures he presented to the trial court.

Two witnesses confirmed Gonzales's belief that the orange tags marked the boundaries of his property. Denise Mandeville testified that when she lived on the property, Gonzales walked with her along the ravine that divided parcel D from parcel 1 and pointed out surveying tags marking the boundary line. Tracy J. McIntosh, who lives on Gonzales's parcel B, also recalled seeing survey markers along the boundary between Gonzales and Dewey's property. William Sleeth, however, the former owner of Westsound Surveying, testified that though his company short platted Gonzales's property, neither he nor anyone associated with his company performed a physical survey or hung survey tags on Gonzales's land.

During cross examination, Gonzales admitted that a pipe in a concrete pad was the correct

[2] "Short platting is dividing a plot of land into four or fewer parcels.

corner marker for the property but claimed that he had not seen the pipe before 2005. Gonzales explained that the pipe was in an uncleared area of the property and that even the surveyors Dewey hired could only find it using a global positioning system. Gonzales also acknowledged that he had adjusted the septic tank location and the house slightly from the location described in the septic plan. Additionally, Gonzales admitted that he had not sought building permits for either his house or garage or paid taxes on the property improvements until "early 2000" or 2002. RP at 171.

Similar to the testimony regarding boundary lines, Dewey and Gonzales presented conflicting estimations of the encroached land value. Gonzales presented a letter from Westsound Surveying explaining that a review of Dewey's land showed a "very limited [number of] building sites" and "[no] suitable building sites" on the "west side of the property" where the encroachment occurred. Ex. 2. Additionally, Gonzales testified that development on the west side of parcel 1 would be unfeasible because of the steep ravine running through Dewey's property. In contrast, Dewey testified that he intended to develop the property. He estimated that if he built a home on the disputed land, he could charge at least $1,200 per month in rent. Dewey speculated that the disputed land could be developed and accessed if he built a road with a series of switch backs running through the ravine. If the switch backs prove unfeasible, Dewey intended to use "a sikorsky helicopter that will pick up an Abrams tank" to set a modular home on the disputed property. RP at 242.

Although Dewey testified that the disputed land was developable, there was substantial evidence that a wetland, a creek, and a steep ravine prevented development. Dewey testified that

he believed he could get a variance to build one dwelling on each five acre parcel or get a variance to permit one dwelling per one acre parcel. On cross examination, Dewey acknowledged that he signed a conversion agreement with Kitsap County that described parcels 1 and 2 as zoned for only one dwelling unit per ten acres.[3]

On September 14, 2007, the trial court ruled that Gonzales trespassed onto Dewey's property and had not demonstrated sufficient facts to support a claim of adverse possession. The trial court, however, denied Dewey's request for a mandatory injunction, ejectment, and damages for trespass. The trial court concluded that requiring Gonzales to move his home and other improvements would be "an extraordinary remedy in light of the equities of this case." RP at 310. Specifically, the trial court found that (1) Gonzales had not acted in bad faith; (2) the damage to Dewey was slight and the benefit of removing the house minimal; (3) there would be no real limitations on Dewey's future use of parcel 1 because the disputed land was not accessible by Dewey and had no "particular" use; (4) it would be "inordinately severe" to require Gonzales to move his house; and (5) there would be a severe disparity in impact if Gonzales were required to move his house. RP at 310-11. Instead, the trial court ordered a boundary adjustment conveying the disputed area to Gonzales in exchange for the value of the disputed land.

On November 2, 2008, both sides presented testimony regarding the estimated value of the disputed land. Gonzales presented a report from a land appraiser comparing the disputed land with the recent sale prices for similarly sized undevelopable land parcels. The appraiser estimated

[3] At trial, Dewey claimed that the language authorizing only one building per ten acres was fraudulently added after signing the conversion agreement.

the encroached land's value to be $795. In contrast, Dewey did not submit an appraisal but submitted his own sworn declaration. In his declaration, Dewey estimated the disputed land's value, including Gonzales's improvements, at $60,000. He noted that he included Gonzales's house's value in his estimate because "[he] consider[ed] the house built on [his] property before [he] purchased it to be [his] property." CP at 25.

The trial court rejected Dewey's claims that the land was developable, determined that his valuation was "unsubstantiated," and accepted Gonzales's appraiser's valuation. The trial court ordered Gonzales to pay Dewey $795 for the boundary adjustment, hire a surveyor to draw a correct legal description of the parcels, and to pay all costs associated with the boundary line adjustment.

On February 8, 2008, the trial court entered a judgment and decree that quieted title, found that Gonzales paid Dewey the fair value of the land and transferred the disputed land to Gonzales. Dewey now appeals.

ANALYSIS

I. Unconstitutional Taking

Dewey argues that the trial court violated article I, section 16 (amendment 9), of the Washington State Constitution, which prohibits the exercise of eminent domain by the state for private use.[4] Specifically, Dewey claims that article I, section 16 (amendment 9) bars the trial

[4] Wash. Const. art. I, § 16 (amend. 9) provides in part:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first

court from compelling a land transfer from Dewey to Gonzales for Gonzales's private use, regardless of the compensation amount. Because courts have repeatedly rejected this interpretation, his argument fails.

To support his argument, Dewey relies heavily on *Tyree v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941). In *Tyree,* the respondents mistakenly built homes on Tyree's land. *Tyree*, 11 Wn.2d at 574. At trial, the trial court denied Tyree's request to eject the respondents. *Tyree*, 11 Wn.2d at 582. Instead, the trial court ordered Tyree to deed the disputed property to the defendants in exchange for $250. *Tyree*, 11 Wn.2d at 582. Tyree appealed, and the Washington State Supreme Court refused to balance the equities and reversed. In its decision, the state Supreme Court noted that "[n]o Washington case [supported] the doctrine" of balancing the equities between the two parties. *Tyree*, 11 Wn.2d at 580. The court determined that any equitable solution would compel Tyree to surrender land for private use. According to the court, any such transfer would violate the Washington Constitution's eminent domain provision. *Tyree*, 11 Wn.2d at 580. *Tyree* does not apply here.

Washington courts have balanced the equities in cases like the one here since 1916 and have repeatedly held that there is no constitutional bar to balancing the equities and conveying encroached land to the encroacher for its fair market value. In *People's Savings Bank v. Bufford*, the individual selling the disputed land pointed out the wrong lot to the buyers, the Buffords. 90 Wash. 204, 205, 155 P. 1068 (1916). The Buffords built their home on the property, unaware

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made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money.

that People's Bank owned the property. When People's Bank became aware of the encroachment, it sued to quiet title and eject the Buffords from its land. On appeal, the Washington Supreme Court determined that, while the Buffords had no legal claim to the land, "it would be inequitable to permit appellant to oust respondents, or to permit respondents to refuse to (compensate the appellant for their land)." *Bufford*, 90 Wash. at 209. In fashioning its remedy, the Washington Supreme Court placed particular emphasis on both parties' good faith. *Bufford*, 90 Wash. at 209.

The Washington Supreme Court rejected the constitutional reasoning of *Tyree* in *Arnold v. Melani*, where the Court held that a trial court may deny the plaintiff's request for a mandatory injunction when "(1) the encroacher did not . . . take a calculated risk, act in bad faith, or negligently. . . locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships." 75 Wn.2d 143, 152, 437 P.2d 908 (1969). The court held that the constitutional provision relied on in *Tyree* applied only to state exercises of authority and that the constitutional language "was not required for the opinion" and did not bar a court from ordering a boundary adjustment as a remedy between private citizens. *Arnold*, 75 Wn.2d at 152.

Additionally, the court noted that because the encroacher in *Tyree* knew before building that the property line was in dispute, he could not claim the "entire good faith" required before the court would balance the equities. *Arnold*, 75 Wn.2d at 150. Later courts have repeatedly

applied the *Arnold* test to determine if a mandatory injunction would be an oppressive resolution to a land dispute. *See e.g., Proctor v. Huntington*, 146 Wn. App. 836, 192 P.3d 958 (2008); *Hanson v. Estell*, 100 Wn. App. 281, 997 P.2d 426 (2000); *Mahon v. Haas*, 2 Wn. App. 560, 468 P.2d 713 (1970).

Dewey argues that the forced sale in this case is an unconstitutional resolution because the *Arnold* court addressed a slight encroachment, and the court's remedy was a permanent easement to accommodate the existing structures rather than a forced land transfer. Because Washington courts have repeatedly balanced the equities to address significant encroachment, not just slight, and have often relied on forced land transfers to resolve the disputes, Dewey's argument fails. *See e.g. Proctor*, 146 Wn. App at 849 (ordering a forced land transfer to remedy a more than 1,650 square foot encroachment); *Bufford*, 90 Wn. at 209 (ordering a forced transfer of an entire city lot).

Because existing case law contradicts Dewey's argument, we affirm the trial court's order transferring the land to Gonzales.

II. Oppressive Injunction

Dewey also argues that, under the *Arnold* test, Gonzales failed to prove by clear and convincing evidence that balancing the equities was an appropriate resolution. Specifically, he argues that the trial court erred when it concluded that (1) Gonzales had not acted in bad faith and failed to find that he had acted negligently or indifferently; (2) Gonzales's use of the land and the benefit of removal was small; (3) there were no real limitations on Dewey's further use of the land; (4) removal of the home would be impracticable; and (5) there was an enormous disparity in

the hardships. Dewey's arguments fail because substantial evidence supports each of the trial court's findings.

We review a trial court's finding of fact for substantial supporting evidence in the record. *Proctor*, 146 Wn. App. at 844. Substantial evidence is the quantum of evidence sufficient to persuade a rational fair minded person that the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) (citing *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). If that standard is met, we will not substitute our judgment for that of the trial court's. *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 879-80.

A. Negligent Encroachment

Dewey argues that Gonzales failed to satisfy the *Arnold* test's first element because he acted in bad faith, took a calculated risk, or acted negligently or indifferently when building his home.[5] He bases his argument on Sleeth's testimony that his company did not conduct a physical survey or place boundary markers on the property. Additionally, Dewey refers to Gonzales's failure to build his home in complete compliance with his septic permit and failure to obtain other building permits as proof of his negligence.

The trial court concluded that Gonzales did not act in bad faith in building his encroachment. The record supports this conclusion. Gonzales testified that he had the land

[5] We are not persuaded by Dewey's argument that Gonzales's testimony regarding the survey was "[a] blatant misrepresentation designed to mislead the court." Appellant's Br. at 15. Gonzales testified that a survey was performed and that he relied on those markers. We defer to the trier of fact on issues of conflicting testimony and the credibility of witnesses. *Davis v. Dep't. of Labor & Indus.,* 94 Wn.2d 119, 124, 615 P.2d 1279 (1980).

physically surveyed when he subdivided his land in the mid-1980s. He presented exhibits showing surveyor's tags marking the mistaken boundary line. Additionally, two other witnesses testified that they had seen the markers prior to the encroachment and that Gonzales had told them that they marked the boundary line. Despite Dewey's contentions that Sleeth testified that his company had never conducted a physical survey or placed survey markers does not bar the trial court from concluding that Gonzales believed that the markers designated the appropriate boundary or that Gonzales acted in good faith. As the trier of fact, the trial court is best suited to assess conflicting testimony and witness credibility and absent an abuse of discretion, we will not reverse such a determination. *Davis v. Dep't. of Labor & Indust.,* 94 Wn.2d 119, 124, 615 P.2d 1279 (1980)

Dewey argues that the trial court erred when it failed to consider Gonzales's failure to obtain building permits and his variations from the plans submitted with the septic permit application as proof of Gonzales's negligence. In a footnote, Dewey notes that on remand he "will establish that . . . respondent's Short Plat did not comply with RCW 58.17.060 and Kitsap County Ordinance 108, . . . which require a survey prior to final approval." Appellant's Br. 27, fn 2. At trial, however, the only link Dewey attempted to draw between Gonzales's failure to obtain the proper permits and his supposed negligence was Dewey's counsel's bare assertion in closing argument that "[t]here is no reason that these problems wouldn't have been uncovered if [Gonzales had obtained permits]." RP at 275. The evidence Dewey provided to the trial court simply did not establish that Gonzales's error would have been discovered if he had complied with applicable regulations.

There was sufficient evidence, including Gonzales's, Mandeville's, and McIntosh's testimony, to support the trial court's conclusion that because Gonzales reasonably relied on survey markers, he satisfied the first prong of the *Arnold* test.

B. Damage to the Land Owner is Slight and Benefit of Removal Small

Dewey next argues that Gonzales failed to establish the second element of the *Arnold* test that the damage to the landowner is slight. In this context, "slight" refers to the damage to the land owner and the benefit of removal, not the size of the encroachment. *Arnold*, 75 Wn.2d at 152. To satisfy this element, the encroachment need not be so small as to be de minimis. *Arnold*, 75 Wn.2d at 148. For instance, in *Proctor*, the defendant's house, garage, and driveway were located entirely on the plaintiff's land. The trial court there concluded that the defendant's good faith acts (reliance on a misplaced survey marker) supported an equitable remedy rather than an injunction. 146 Wn. App. at 850. Similarly, in this case, Gonzales relied on misplaced surveying markers when building his home, which encroaches 1,500 square feet on to Dewey's property.[6]

There is sufficient evidence in the record to conclude that the damage to Dewey's property and the benefit of removing the encroachment was small. The trial court repeatedly noted that the disputed area was undevelopable because Dewey could not access it. A deep ravine, wetland, and designated creek area surrounded the encroachment. A surveyor, land appraiser, and Kitsap County wetland's specialist agreed that Dewey could not develop the disputed area.

C. No Limitations on Future Use of Land

[6] In his brief, Dewey mistakenly asserts that the size of the encroachment is 1,500 square yards. The true size is 1,500 square *feet*.

Dewey argues that Gonzales failed to establish that the encroachment did not limit the future use of his land. Dewey claims that "it is chiefly the area occupied by [Gonzales's] house and yard that can be used for development . . . ." Appellant Br. at 19. Dewey is alone in his belief. Westsound Surveying noted that the only site appropriate for development was in the southwestern corner of the property, not near the encroachment. Additionally, the trial court correctly noted that the boundary adjustment would not prevent Dewey from building the one residential dwelling per five acres as Kitsap County zoning regulations permitted. Ironically, Dewey himself placed the greatest limitation of future use of his land by entering into an agreement with Kitsap County limiting future use to one dwelling per ten acres. Dewey's argument fails because there was substantial evidence to support the finding that Dewey could not develop the encroached area and, thus, the encroachment did not limit Dewey's use of the remaining land.

D. Removal of The Structure Would be Impracticable

Dewey argues that Gonzales failed to establish that removal of his home would be impracticable. The argument fails because there is substantial evidence to support the trial court's finding that removing Gonzales's house, yard, and garage from the disputed area would be impracticable. At trial, Gonzales presented several exhibits showing a large house with a concrete foundation and brick patio and smaller wooden outbuilding. Although Gonzales did not testify as to the estimated cost of removing his home from the land, the photographs of the home combined with common sense are sufficient to convince a rational, fair minded person that it would be impracticable for Gonzales to remove his home from the land.

E. Enormous Disparity of Hardship

Finally, Dewey argues that Gonzales failed to demonstrate an enormous disparity between Dewey's hardship in Gonzales's encroachments remaining on his land, and Gonzales's hardship in removing it. Substantial evidence supports the trial court's finding that the "loss of the disputed area where Mr. [Gonzales's] house sits would be a very severe result for Mr. Gonzales, whereas the financial and practical impact of the boundary line adjustment for Mr. Dewey would . . . be much less." RP at 311. As discussed above, Gonzales presented evidence that while an injunction would force him to remove his entire home from the property, Dewey would gain little because he could not develop the disputed land.

Furthermore, the hardships seem particularly unbalanced in this case because Dewey knew about the encroachment before he purchased the land. Dewey testified that his realtor was concerned enough about a possible boundary issue that she hired a finder to locate the corner marker. Despite the troubling absence of a corner boundary marker and Dewey's own suspicions that Gonzales house encroached on the land, Dewey purchased the land without making any attempt to clarify the boundaries. While the trial court found that Gonzales innocently built his house on Dewey's property, it is undisputed that Dewey purchased the property with substantial knowledge that the boundaries were unclear. Unlike Gonzales, Dewey not only knew about the possible hardships the encroachment caused but did not consider the encroachment (and any resulting hardships to him) to be a risk when he purchased the land.

Because substantial evidence supports the trial court's finding as to each element of the *Arnold* test, we reject Dewey's argument that the trial court erred in denying the injunction.

III. Judgment Awarded for the Value of the Encumbered Property

Dewey argues that the trial court erred in awarding him the fair value of the encroached land rather than a judgment for the "loss of use and occupancy of their property prior to the court's ruling." Appellant's Br. at 21. Additionally, Dewey argues that the award of $795 for the loss of the disputed land is insufficient.

A trial court has broad authority in determining damages. As the trier of fact, it has discretion to award damages within the range of relevant evidence. *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990). We will not disturb a fact finder's damage award unless it shocks the conscience or appears to have been the result of passion or prejudice. *Mason*, 114 Wn.2d at 850.

The trial court refused to award damages for the "loss of use and occupancy" of the 1,500 square feet of land because the trial court concluded that Dewey could not use or occupy the disputed land. RP at 310. As we discussed in the preceding section, Gonzales presented extensive evidence that Dewey could not access or develop the disputed land. Both the surveyor and the land appraiser agreed with Gonzales's evidence. Accordingly, the trial court properly refused to award damages based on Dewey's estimated rental income from a home built on the disputed land.[7]

[7] Dewey claims that the proper amount of damages would be "mense profits" or the value of the fair use of the land. Appellant's Br. at 21. According to Dewey, the value should be the estimated monthly rental value of the land for the six years before commencement of the action (the maximum permitted under Washington law). Considering that Dewey purchased the land in 2004 and filed suit in 2005, an award of damages beginning roughly five years before Dewey purchased the land would be unsupportable.

Dewey also claims that the trial court erred by refusing to award treble damages and attorney fees and costs. Under RCW 4.24.630, "[e]very person who goes onto the land of another and who removes timber . . . or other similar valuable property from the land, or wrongfully causes waste or injury to the land, is liable to the injured party for treble the amount of the damages caused by the removal . . . or injury." Damages may also include reasonable costs such as attorney fees and other litigation related costs. RCW 4.24.630. Dewey claims that the trial court should have determined that by building his home on Dewey's land, Gonzales caused waste to the land, depriving Dewey of the possible rental income of a home built on the land and injury by removing "substantial quantities of soil." Appellant's Br. at 23. Dewey's argument fails because it unreasonably construes RCW 4.24.630 to allow as damages the possible rental income of a property the trial court found to be undevelopable. We affirm the trial court's determination that Gonzales caused neither waste nor injury to Dewey's land and that an award of treble damages was not appropriate.

Additionally, Dewey argues that the trial court erred in valuing the disputed land at a "paltry" $795. Appellant's Br. at 24. Specifically, Dewey claims that the fair value of the land should have been the $60,000 he estimated the land was worth.[8] It is unclear if Dewey is contending that Gonzales's improvements should be included in estimating the fair value of the land or if he is using the improvement value to estimate what the fair value would be if he built a similar residential structure on the land. Under either reading, the argument fails.

If Dewey means to argue that the fair value of the encroached land should include

[8] In his sworn declaration, Dewey included the value of Gonzales's home in his estimation.

Gonzales's improvements, that argument fails because there is no case law supporting his conclusion that an encroacher who is granted an equitable remedy such as a boundary adjustment must compensate the owner not only for the fair value of the encroached land but for the value of encroachments as well.

If Dewey means to argue that the trial court erred in refusing to consider the possibility of a similar residential structure in assessing the land's value, the argument fails because there was substantial evidence to support the trial court's determination that the disputed land was not developable. Dewey is correct that a landowner may testify to the value of his property. *Meeker v. Howard,* 7 Wn. App 169, 499 P.2d 53 (1972). Dewey's implication that a court must place greater weight on a landowner's testimony is incorrect. In this case, the trial court balanced Dewey's flat assertion that the land's value was $60,000 against an assessment by a professional appraiser who compared Dewey's encroached area with similarly sized plots of undeveloped land. Given the extensive evidence demonstrating that the encroached land was undevelopable, the trial court's award of $795 in damages neither shocks the conscious nor indicates passion or prejudice in the court's decision. We affirm the trial court's award of $795 in damages.

IV. Subdivision of Gonzales's Land

Dewey is unclear in his fourth assignment of error. He first argues that the trial court erred in entering a finding that Gonzales had obtained a survey of his property. This assignment of error is problematic because the trial court never specifically made a finding that Gonzales obtained a survey. Later, Dewey appears to clarify his argument by claiming that the trial court erred in finding that the land was subdivided in 1982, and that the trial court placed "undue

emphasis" on the legal subdivision when determining that Gonzales acted in good faith. Appellant's Br. at 26. It appears that this argument addresses whether Gonzales acted in good faith in relying on the survey markers as his boundaries. Because substantial evidence supports the trial court's determination that Gonzales acted in good faith as we thoroughly discussed in section one, we need not address this argument further.[9]

[9] Regarding the first prong of Dewey's argument, given Gonzales's unclear recollection of the year of the subdivision, the short plat documents, and Sleeth's testimony, substantial evidence may not support the trial court's finding that the land was subdivided in 1982, as opposed to 1986. Any mistake here though was clearly not material to the trial court's decision on the merits. An error is subject to harmless error analysis unless the petitioners have demonstrated that the error was prejudical. *Thomas v. French,* 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Only those errors that "affect, or presumptively affects, the outcome of the trial" are prejudical. *Thomas*, 99 Wn.2d at 104.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Houghton, J.

Quinn-Brintnall, J.